Federal Court  Cour fédérale

Date: 20150928

Docket: IMM-415-15

Citation: 2015 FC 931

Ottawa, Ontario, September 28, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

ALI ALVIN FAROON

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

AMENDED JUDGMENT AND REASONS

[1] The applicant, Ali Alvin Faroon, seeks judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act* [Act] of the decision of the Minister's delegate based on the Report of an Inland Enforcement Officer of the Canada Border Services Agency (CBSA) (the Officer) to refer the applicant to an admissibility hearing pursuant to subsection 44(2) of the Act. The applicant submits that the delay in the decision to refer the applicant to the admissibility hearing is an abuse of process and a breach of the applicant's section 7 rights under the

Canadian Charter of Rights and Freedoms [*Charter*] and, as a result, the proceedings should be permanently stayed.

[2] For the reasons that follow, the application is dismissed. I do not find an abuse of process in the present circumstances.

Background

[3] The applicant, a citizen of Fiji, arrived in Canada in 1987 at the age of 15. He became a permanent resident of Canada on May 9, 1995.

[4] On December 2, 1999, the applicant was convicted of living off the avails of an underage prostitute, in contravention of subsection 212(2) of the *Criminal Code*, RSC 1985, c C-46.

[5] On May 23, 2003, the applicant was convicted of assault causing bodily harm, in contravention of paragraph 267(b) of the *Criminal Code*.

[6] Both offences are indictable offences punishable by up to 10 years imprisonment.

[7] On June 28, 2013, the Officer sent the applicant a letter advising him that he may be inadmissible to Canada (initial letter). The applicant was given the opportunity to provide submissions and did so on July 30, 2013. His submissions recounted his background in Canada, raised potential Humanitarian and Compassionate (H&C) considerations and enclosed letters of support.

[8] On November 29, 2013, in response to the applicant's inquiry about the status of his case, the Officer indicated that she had completed her review of the file and that she had forwarded it to her supervisor on October 15, 2013.

[9] The Officer's report, dated October 15, 2013, which is included in the record, states that in the Officer's opinion, the applicant is inadmissible on the grounds of serious criminality pursuant to paragraph 36(1)(a) of the Act due to convictions in Canada for criminal offences punishable by a maximum term of imprisonment of at least 10 years.

[10] The applicant made several inquiries asking when a decision would be made (on February 5, April 5, July 14 and August 1, 2014). The Officer replied on August 25, 2014, indicating that the Minister's delegate had returned the file and that a decision would be made within one week of receiving any new submissions. The applicant was given until September 10, 2014 to make new submissions and did so, again noting H&C considerations and enclosing letters from family and photographs.

[11] On October 1 and 15, 2014, the applicant again inquired whether a decision had been rendered.

[12] In an undated "Section 44(1) and 55 Highlights – Inland Cases" report, the Officer noted in the recommendation section that it does not appear, apart from the applicant's two children and common law partner, that he has established himself in Canada and added that "[d]ue to the change in IRPA concerning Appeal Rights, I recommend client be issued a Stern Warning Letter and the case referred to Investigations for follow up on possible organized crime." The Manager's notation, dated September 23, 2014, indicates the Manager's disagreement: "Do not concur with this recommendation – this was previously sent back … for additional investigation."

[13] Another "Section 44(1) and 55 Highlights – Inland Cases" Report, by another Officer, dated July 18, 2014, included a recommendation that the applicant be convoked to an

admissibility hearing and be issued a Deportation Order based on paragraphs 36(1)(a) and 37(1)(a), and set out several reasons, including the convictions for indictable offences and that "Ali is known to associate with gang members/associates in the lower mainland." The Manager's notation, dated September 23, 2014 indicates that the file was reviewed in its entirety, including the additional submissions, and recommends an admissibility hearing.

[14] On November 12, 2014, the Minister of Public Safety and Emergency Preparedness brought an application pursuant to subsection 44(2) of the Act asking the Immigration Division of the Immigration and Refugee Board to declare the applicant inadmissible under paragraph 36(1)(a) of the Act.

[15] On November 25, 2014, the Immigration and Refugee Board issued a Notice to Appear for Admissibility Hearing (notice of referral) on January 19, 2015 based on the Report of the Minister's delegate, which attached the Officer's October 15, 2013 report.

[16] The admissibility hearing commenced on January 19, 2015. The hearing was adjourned to allow the applicant to apply to this Court for leave and judicial review relating to allegations of abuse of process arising from the delay in pursuing the admissibility hearing.

The Issues

[17] The applicant argues that the delay in bringing the application for an admissibility hearing from June 2013, when he was first made aware that he may be inadmissible to Canada, until November 2014, when the notice of referral was issued, considered in the context of his convictions that date back 12 and 15 years, is an inordinate delay that has caused him prejudice. He argues that it is an abuse of process to continue with the admissibility hearing and, therefore, a permanent stay of proceedings is justified. The applicant also argues, for the same reasons, that

the referral for an admissibility hearing was made in a manner inconsistent with his rights pursuant to section 7 of the *Charter*.

[18] The issues to be addressed are, therefore:

(1) Whether there has been a delay amounting to an abuse of process which should result in a permanent stay of proceedings.

(2) Whether the referral for the admissibility hearing was made in a manner inconsistent with section 7 of the *Charter* and should result in a permanent stay of proceedings.

The Applicant's Submissions

[19] The applicant relies extensively on *Fabbiano v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 1219 [*Fabbiano*], where a stay of proceedings was granted for abuse of process, and submits that, given the principles it sets out governing abuse of process and the analogous facts to the present case, a stay of proceedings should result for the applicant.

[20] The applicant notes that in *Fabbiano*, the Court stated that the "test is whether the delay caused 'actual prejudice of such magnitude that the public's sense of decency and fairness is affected'" (at para 10). The applicant submits that the delay he experienced has caused him such prejudice and that the public's sense of decency and fairness would be offended by proceeding with the admissibility hearing.

[21] The applicant submits that he was prejudiced by the 18 month lapse of time between when he received the letter advising that he may be inadmissible to Canada and when he received the notice of referral. He notes that he made repeated inquiries about the progress of the admissibility proceedings and the 18 month period of uncertainty had a prejudicial impact on

him psychologically. The 12 year period since the date of his last conviction, given that no action was taken to address his potential inadmissibility until June 2013, adds to the prejudice.

[22] The applicant argues that the entire 12 year period should be considered, relying on *Ratzlaff v British Columbia (Medical Services Commission)*, 17 BCLR (3d) 336 at para 20, [1996] BCJ No 36 [*Ratzlaff*], where the British Columbia Court of Appeal noted that "[w]here the position of the party at risk … is that the delay is such as to amount to an abuse of power, I think the whole of that period of delay must be looked at in determining whether it is such as to amount to oppression or an abuse of power."

[23] The applicant notes that in *Fabbiano*, at para 8, the Court found that a remedy may be provided where proceedings have become oppressive, including where a person carries on their life reasonably believing that no further action will be taken against them. The applicant submits that this is his situation; he believed that no further action would be taken against him in the 12 years between his criminal convictions and the Officer's referral report.

[24] The applicant states that over these years he established roots, particularly because of his children. He notes that he has been in Canada since 1987 and submits that allowing a person to establish their livelihood and family only to later face the prospect of removal is oppressive and unfair.

[25] The applicant points out that no explanation has been provided for the delay, the facts are not complicated or in dispute, and the delay cannot be attributed in any way to him. These factors must be considered in assessing the impact of the delay (*Blencoe v British Columbia (Human Rights Commission),* 2000 SCC 44, [2000] 2 SCR 307 [*Blencoe*].

[26] The applicant also argues that there are other similarities with the facts in *Fabbiano*, including that the information relied on to support his inadmissibility is over 12 years old. In *Fabbiano,* the information relied upon was approximately seven years old and the Court found prejudice, given that Mr Fabbiano's circumstances had changed in that period. Further, like the facts in *Fabbiano,* because no action was taken for many years, officials were apparently not concerned about any risk posed by the applicant.

[27] In addition, in *Fabbiano* the Court found that the strict provisions of the Act relating to when H&C factors may be considered, combined with a delay in proceedings, impaired Mr Fabbiano's ability to present further submissions.

[28] The applicant adds that he has been prejudiced by not knowing the case he had to meet. He relies on *Hernandez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 725 at para 43, [2007] FCJ No 965, where the Court found that the section 44 report should be set aside because a relevant document had been provided to the Minister but not disclosed to the applicant. He notes that several of the reports of officers included in the record refer to his association with gang members/associates, yet this information was not disclosed to him to permit him to determine who these alleged associates are or to dispute the allegation. He argues that this reference tainted or influenced the subsection 44(2) report.

[29] The applicant points out that the Officer initially recommended a warning letter, which would be an alternative to the admissibility report, due to the consequences of an inadmissibility finding, from which there is no appeal. He argues that there is no explanation for why this recommendation was not supported given it was made by the Officer most familiar with his case.

[30] The applicant also argues that he served his sentence for the two convictions in 1999 and 2003 and the consequences that may now arise under the Act are tantamount to double jeopardy.

[31] In summary, the applicant submits that the inordinate delay in proceeding against him offends the public's sense of fairness and will bring the administration of justice into disrepute.

[32] More generally, the applicant submits that the impact of section 44 proceedings raise issues of human rights with limited or no remedies for those affected.

The Respondent's Submissions

[33] The respondent notes that determinations of whether there is an abuse of process depend on the specific facts and the context (*Fabbiano* at para 10, *Blencoe* at para 122) and moreover, such cases are "extremely rare" (*Canada (Minister of Citizenship and Immigration) v Omelebele*, 2015 FC 305 at para 23).

[34] The respondent submits that although the principles set out in *Fabbiano* are not in dispute, the facts, which led the Court to find an abuse of process and to stay the admissibility proceedings, are quite different.

[35] In *Fabbiano*, the applicant moved to Canada when he was six years old and had lived in Canada for 51 years. The admissibility hearing was related to Mr Fabbiano's alleged involvement in organized crime in the 1990s. Although Mr Fabbiano had one conviction, there was a lack of evidence about the organized crime allegations. Mr Fabbiano was advised in 2006 that he might be inadmissible to Canada and he made submissions at that time, but heard nothing more until 2013 when he was given notice of his hearing. The Court noted that there were many

H&C considerations at play, including his long establishment in Canada, steady employment, and medical issues, but he had no opportunity to make updated submissions.

[36] The respondent notes the difference with the facts in the present case: the applicant's two convictions are for serious crimes and are not in dispute; the applicant was advised in 2013 that he may be inadmissible; he made submissions at that time and made submissions again in September 2014 prior to the subsection 44(2) report; the notice of referral was provided 18 months after the initial letter; and, the Officer's report reflects consideration of the applicant's submissions.

[37] The respondent acknowledges that there was a considerable delay between the convictions and the notice of referral. However, the 18 month delay is not comparable to the almost seven year delay in *Fabbiano* and to Mr Fabbiano's inability to make recent submissions.

[38] The respondent submits that delay without more does not constitute an abuse of process. The delay must be so oppressive as to taint the proceedings. To find an abuse of process, it must be established that an unreasonable delay was caused by the respondent and that the delay has caused prejudice to the applicant (*Blencoe* at paras 101, 121). In this case, the applicant has not provided any evidence of prejudice, only an assertion that his life has been affected by uncertainty since being advised that he may be inadmissible in 2013. Even if the applicant were prejudiced by such uncertainty, the respondent argues that the applicant has not shown that the delay was so excessive as to constitute an abuse of process.

[39] The respondent highlights that the referral for an admissibility hearing is based on the applicant's two convictions and on paragraph 36(1)(a) of the Act for serious criminality, and not for organized criminality. Therefore, the applicant's allegations about not knowing the case he

has to meet are not relevant. The allegations regarding possible gang affiliation are not part of the inadmissibility report. Moreover, the Officers' reports and the notations of the Manager demonstrate that the file was reviewed in this period resulting in the referral proceeding on the basis of paragraph 36(1)(a) only.

[40] The respondent notes that the applicant will be given the opportunity to respond to the issues raised in the subsection 44(2) report at the admissibility hearing. The applicant has not shown that his admissibility hearing will be compromised in any way by the 18 month delay in making the referral. He will have an opportunity to address the grounds of his inadmissibility. The respondent submits that an admissibility hearing is not a "rubber stamp" process as suggested by the applicant, and the Immigration and Refugee Board will consider the report and the applicant's submissions.

The Principles from the Jurisprudence

[41] As noted above, the applicant relies extensively on the recent decision of this Court in *Fabbiano*, where Justice O'Reilly canvassed the relevant jurisprudence, provided a concise summary of the principles and proposed an approach to be applied.

[42] It is helpful to set out the key passages in *Fabbiano* and elaborate on some of the principles with reference to the earlier jurisprudence.

[43] Justice O'Reilly explained the concept of abuse of process, noting that unacceptable delay which causes significant prejudice is one situation that could lead to such a finding, and where the proceedings have become oppressive for other reasons is another possible situation. He highlighted that a stay of proceedings for abuse of process is an extraordinary remedy, noted the test that must be met, explained the relevant factors to be considered and summarised the

three step approach to determine whether a stay should be imposed. The relevant passages are at paras 8-10:

> [8] Abuse of process is a common law principle permitting courts to stop proceedings that have become unfair or oppressive. This includes situations where there has been an unacceptable delay resulting in significant prejudice (*Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, at para 101). A key question is whether the delay "impairs a party's ability to answer the complaint" (at para 102). Alternatively, a court can provide a remedy where the proceedings have become oppressive for other reasons including, for example, where the person carried on with his life reasonably believing that no further action would be taken against him (*Ratzclaff v British Columbia (Medical Services Commission)* (1996), BCJ No 36 (BCCA) (QL), at para 23).
>
> [9] A stay of proceedings for an abuse of process is an extraordinary remedy reserved for the clearest cases of prejudice. To grant that remedy, "the court must be satisfied that, 'the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted'" (*Blencoe* at para 120, citing Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998) at 9-68).
>
> [10] Whether delay justifies a stay of proceedings depends on all of the circumstances, including the purpose and nature of the case, its complexity, the facts and issues involved, and whether the affected person contributed to or waived the delay (*Blencoe*, at para 122). The test is whether the delay caused "actual prejudice of such magnitude that the public's sense of decency and fairness is affected" (at para 133). There are three steps in considering whether a stay should be imposed:
>
> 1. There must be prejudice to the person's right to a fair trial or the integrity of the justice system.
>
> 2. There must be no adequate alternative remedy.
>
> 3. If there is uncertainty after steps 1 and 2, the court must balance the interests favouring a stay (*ego*, denouncing misconduct or preserving the integrity of the justice system) against the public

> interest in having a decision on the merits (*R v Babos*, 2014 SCC 16, at para 32).

[44] The leading case, from which many of the principles above are derived, is *Blencoe*. In *Blencoe*, the Supreme Court of Canada noted that delay on its own will not be sufficient to warrant a stay of proceedings:

> [101] In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091, at p. 1100*; Akthar v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 32 (C.A.). In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.
>
> [102] There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy (D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at p. 9-67; W. Wade and C. Forsyth, Administrative Law (7th ed. 1994), at pp. 435-36). It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied (see, for example, J. M. Evans, H. N. Janisch and D. J. Mullan, Administrative Law: Cases, Text, and Materials (4th ed. 1995), at p. 256; Wade and Forsyth, *supra*, at pp. 435-36; Nisbett, *supra*, at p. 756; Canadian Airlines, *supra*; *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 (Ont. Div. Ct.); *Freedman v. College of Physicians & Surgeons (New Brunswick)* (1996), 41 Admin. L.R. (2d) 196 (N.B.Q.B.)).

[45] The Court noted at para 115 that an unacceptable delay that may amount to an abuse of process is not limited to situations where the delay affects a fair hearing, and could include a

delay that "has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process." The Court noted, however, that "few lengthy delays will meet this threshold."

[46] At para 120, the Court set out the test that to find an abuse of process, the court must be satisfied that: "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" and added that such cases will be rare.

[47] The Court noted that a contextual analysis is required to determine whether the delay is inordinate at para 122:

> [122] The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

[48] The Court reiterated, at para 133, that more than delay is required to find an abuse of process; the delay must cause real prejudice to the extent that it affects the public's sense of decency and fairness.

[49] The ultimate three part test or approach summarised in *Fabbiano*, was set out in *R v Babos*, 2014 SCC 16, at para 32, [2014] 1 SCR 309 [*Babos*] in the context of whether a stay of a

criminal prosecution should be granted, although the Supreme Court of Canada's guidance extends beyond that context, with the necessary modifications.

[50] In *Babos*, the accused alleged misconduct by the police in the investigation and by the Crown in the prosecution of the charges. The trial judge imposed a stay. On appeal, the stay was set aside. The Supreme Court of Canada agreed, noting that a stay is a drastic remedy in criminal proceedings (at para 30). The Court noted that two categories of cases may lead to an abuse of process and a stay of criminal proceedings: first, where state conduct compromises the fairness of an accused's trial; and second, where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (at para 31). The Court then set out the test at para 32:

> [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> > (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
> >
> > (2) There must be no alternative remedy capable of redressing the prejudice; and
> >
> > (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).

There is no Abuse of Process

[51] I appreciate that the consequences to the applicant arising from an admissibility hearing are significant. Counsel for the applicant made submissions regarding the impact of recent changes to the Act on persons such as the applicant and argued that these changes are unjustified, do not permit consideration of countervailing factors, and, more generally, do not reflect Canada's values. However, the role of the Court is to apply the law to the facts of the case before it. There are other fora to express concerns about the law and policy of the Government.

[52] The delay, when looked at from the date of the applicant's last conviction to the subsection 44(2) report, is extensive and is unexplained. As the applicant noted, if the CBSA had serious concerns about him, it could have acted much earlier. I acknowledge that the impact on the applicant, who has been in Canada for over 25 years, and on his family may be harsh. However, I do not find that this is one of the rare or clearest of cases where an abuse of process has been established and where a stay of proceedings would be justified.

[53] Adopting the same approach as Justice O'Reilly in *Fabbiano*, I have considered the following: the basis for the applicant's claim of abuse of process, the purpose and nature of the applicant's case and its complexity, the issues at stake, whether the applicant contributed to the delay, and whether the applicant was prejudiced by the delay. Based on these considerations, I have assessed whether the harm to the public interest in allowing the admissibility hearing to proceed would be greater than the harm caused by staying the admissibility hearing and have concluded that it would not. The public's sense of decency and fairness would not be offended by allowing the admissibility hearing to proceed.

[54] The applicant's claim of abuse of process is based on the 18 month delay and the uncertainty in that period, and on the overall period since the date of his convictions. The applicant relies on *Ratzlaff* at para 20 to support his submission that the whole period should be considered. However, the passage relied on pertains to the facts in *Ratzlaff* regarding a lengthy delay in moving forward with professional disciplinary charges against a doctor despite the doctor's attempts, dating back ten years, to resolve the issue. The doctor retired thinking his billing dispute had been resolved. The British Columbia Court of Appeal found that the delay was egregious and amounted to an abuse of process even though a fair hearing could still be held.

[55] Unlike the facts in *Ratzlaff,* the applicant did not engage with CBSA to determine the consequences of his convictions prior to receiving the initial letter in 2013. Although counsel for the applicant argued that he reported regularly and was available for interviews, the delay for which he argues that he was prejudiced due to uncertainty is only the delay from June 2013 to the date of receipt of the notice of referral in November 2014.

[56] There is no evidence that the delay between the initial letter and the referral decision has prejudiced the applicant. It has not impaired his ability to have a fair hearing and to answer the claims that underlie the referral, given that his convictions are a matter of record and are not in dispute. The references to association with gang members included in other reports are not the basis for the referral. There is no evidence that the applicant has conducted himself in any different manner since receiving the initial letter relying on an assumption that no further action would be taken against him. Nor is there any evidence that the CBSA investigation was improper in any way.

[57] The length of time that it took for the referral to be made has not been explained. The facts are not complicated and it appears that the information which formed the basis for the referral was available much earlier. However, the delay cannot be characterised as inordinate. The record demonstrates that the applicant's file was reviewed on a few occasions and, as a result of the review, the referral proceeded on the basis of paragraph 36(1)(a) of the Act and not on the basis of other information that had been considered. The reports on the record also demonstrate that the applicant's submissions were considered.

[58] Nor can the Minister's decision to pursue the referral for an admissibility hearing be considered as double jeopardy. The applicant served the sentence for his convictions but there are additional consequences for a permanent resident who has criminal convictions, as provided in the Act.

[59] The applicant was fully aware during the 18 month period that the investigation was ongoing. He was advised that the October 2013 report had been referred to a supervisor and he was later advised that additional information had been requested by the Minister's delegate, that the decision would be made within a few weeks, and that he could make additional submissions and he did so. The delay did not impair his ability to answer the allegations. He knew that he could be referred to an admissibility hearing and he knew that he would be at risk of removal.

[60] By comparison, in *Fabbiano*, more than six years elapsed between the initial letter in 2007 and the referral decision in 2013. Mr Fabbiano made submissions in 2007 and had no further opportunity to update his submissions. The Court found that after more than six years, it was reasonable for Mr Fabbiano to conclude that he was no longer at risk of removal.

[61] With respect to the delay between the applicant's criminal convictions and the initial letter, while I agree that the respondent could have taken action much earlier, and no explanation has been provided for the lack of action, I am mindful of the words of the Court in *Blencoe* that "staying the proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period" (at para 101).

[62] The jurisprudence is clear that delay alone is not enough; real prejudice must arise from the delay. The delay from the date of the convictions, if this period should be considered, has not affected the applicant's ability to address the allegations that the referral is based on. The convictions have been established and there is no need to find witnesses from 1999 or 2003 to establish or refute those convictions.

[63] The applicant argues that he carried on with his life reasonably believing that no further action would be taken against him following his convictions and sentence, however, there is no evidence of this, other than that he has two children and a common law partner. The Officer's first "Section 44(1) and 55 Highlights Report – Inland Cases" noted that there is little evidence of establishment in Canada. The record indicates that one of his children was born before his first conviction, so it cannot be suggested that he chose to have a family in Canada on the assumption he would be immune from the consequences of his convictions. Nor is there any evidence that he conducted himself in a different manner after June 2013 or after failing to get prompt responses about the status of the inadmissibility proceedings on the assumption that no further action would be taken. In addition, he made submissions in July 2013 and in September 2014 which noted his family in Canada and other H&C related factors.

[64] Moreover, the Supreme Court of Canada has set a high bar for finding an abuse of process where the fairness of the hearing has not been compromised. In *Blencoe*, the Court noted that it must "directly [cause] significant psychological harm to a person, or [attach] a stigma to a person's reputation, such that the human rights system would be brought into disrepute" (at para 115).

[65] The applicant has not established such prejudice; his submission that he is established in Canada and will no doubt suffer psychological harm, does not reach the level of significant psychological harm or stigma to a person's reputation.

[66] Although the 18 month delay would cause uncertainty and anxiety for anyone, including the applicant, I do not find that this delay was so lengthy as to be one of the extremely rare "clearest of cases" that constitute an abuse of process.

[67] In summary, a stay of proceedings is an exceptional remedy reserved for the clearest of cases. Delay in pursuing proceedings, without more, is not enough. There must be prejudice to the applicant arising from an inordinate delay. In the present case, the delay is not inordinate and it has not impaired the ability of the applicant to respond to the subsection 44(2) report, nor has it caused the applicant psychological harm or other prejudice. Although the facts are not complicated, the delay has not been explained and the stakes are high for the applicant, to impose a stay based only on the delay is the same as imposing a limitation period on pursuing inadmissibility proceedings.

[68] These considerations lead to the determination whether "the damage to the public interest in the fairness of the administrative process should the proceedings go ahead would exceed the harm to the public interest in the enforcement of the legislation in the proceedings were halted." I

cannot conclude that the public interest would be damaged by proceeding with the subsection 44(2) admissibility hearing. If the inadmissibility proceedings are permanently stayed, only due to the passage of time, and not due to any prejudice to the applicant other than uncertainty regarding the next steps over an 18 month period, the integrity of the justice system would arguably be more damaged. In my view, the public interest is best served by the admissibility hearing proceeding and being determined on its merits.

[69] The applicant submits that if the three part test in *Fabbiano* (which as I noted above, is derived from *Babos*) is applied, the Court should conclude that there is no other adequate remedy other than a stay. I have considered and applied that test. As noted, I do not find that there has been a prejudice to the accused. He continues to have the ability to answer the allegations at his admissibility hearing. He has not established any other prejudice. Nor do I find that the integrity of the justice system has been prejudiced. Stage two of the test, the consideration of an adequate alternative remedy, only comes into play once the Court finds that there has been prejudice. An alternative remedy would be aimed at addressing or correcting any prejudice short of imposing the stay of proceedings. No prejudice has been found, so no alternative remedy need be considered.

[70] The facts of this case simply do not meet the high threshold established in the jurisprudence to find an abuse of process and to, in turn, order a stay of proceedings.

There has been no breach of the applicant's Section 7 rights

[71] The applicant submits that a delay in administrative procedures can violate security of the person if the delay causes psychological harm (*Mahjoub (Re)*, 2013 FC 1095 at para 252

[*Mahjoub*]). The applicant reiterates that the delay was inordinate, unexplained, caused him prejudice and that proceeding now would be oppressive.

[72] In *Mahjoub*, the Court stated with respect to section 7:

> [252] Turning to section 7 of the Charter, a violation of procedural fairness amounting to a violation of fair trial rights when an individual's liberty is engaged may occur through significant prejudice caused by unacceptable delay (*Blencoe* at paragraph 101). Such prejudice may be established in two ways. First, administrative delay may warrant a remedy where a party's ability to assert its case is impaired, for example if essential witnesses have died, the memories of witnesses have faded, or evidence is lost (*ibid*. at paragraph 102). Second, delay may warrant a remedy where the affected individual experiences significant psychological harm or reputation stigma, such that the administrative process suffers disrepute and the delay constitutes an abuse of process. Justice Bastarache emphasized the rare circumstances under which even a lengthy delay will reach this threshold (*ibid*. at paragraph 115). He also highlighted the importance of a direct causal connection between the delay and the harm suffered (*ibid*. at paragraph 133).

[73] Given the high threshold established in *Mahjoub*, there is no violation of the applicant's section 7 rights. The applicant has not established that his ability to participate in his admissibility hearing and answer the allegations has been impaired. There is no evidence of any impact on the applicant's reputation or other stigma or psychological harm. His submission that it can be assumed or presumed that the delay would occasion psychological harm to him is not sufficient to establish psychological harm.

JUDGMENT

THIS COURT'S JUDGMENT IS THAT:

1. The application for judicial review is dismissed.

2. There is no certified question.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-415-15
STYLE OF CAUSE:	ALI ALVIN FAROON V THE MINISTER OF CITIZENSHIP & IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JULY 22, 2015
AMENDED JUDGMENT AND REASONS:	KANE J.
DATED:	SEPTEMBER 28, 2015

APPEARANCES:

Gerald G. Goldstein	FOR THE APPLICANT
Edward Burnet	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Barbeau, Evans & Goldstein Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENTS